Court of Appeals No. 57066-1-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington, Respondent

v.

Bruce Clive Gingrich, Appellant

Thurston County Superior Court
Cause No. 21-1-01182-34

The Honorable Judge Indu Thomas

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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INTRODUCTION AND SUMMARY OF ARGUMENT

At Bruce Gingrich's trial, the State did not introduce sufficient evidence to convict him of burglary. The State did not prove that he unlawfully entered another person's home. Nor did the evidence show that entry was made with intent to commit a crime. The State also failed to prove that Mr. Gingrich was armed with a deadly weapon. Because the evidence was insufficient, the convictions must be reversed, and the charges dismissed with prejudice.

If the charges are not dismissed, the case must be remanded for a new trial. The proceedings were marred by prosecutorial misconduct. The prosecutor misstated the role of the jury, diluted the presumption of innocence, and undermined the State's burden of proving guilt beyond a reasonable doubt. She made arguments that conflicted with the law and the court's instructions, relied on facts not in evidence, and impugned defense counsel. The misconduct was flagrant and ill-intentioned and could not have been cured with an instruction.

In addition, the court's instructions misled jurors as to how they should review the evidence. The court told jurors that conviction could flow "from the evidence," but that acquittal required jurors to "weigh[] all the evidence. This suggested that acquittal required a more stringent review of the evidence than was required for conviction. This violated Mr. Gingrich's right to due process.

Mr. Gingrich was also denied the effective assistance of counsel. His attorney unreasonably failed to object to prosecutorial misconduct. Counsel also failed to propose a missing witness instruction, despite the absence of the State's main witness. Mr. Gingrich was prejudiced by his attorney's deficient performance.

If the convictions are not reversed, the case must be remanded for a new sentencing hearing. Based on a single transaction, Mr. Gingrich was convicted of both first-degree burglary and residential burglary. Although the court vacated the lesser conviction, the Judgment and Sentence makes clear that both convictions are valid. This violated Mr. Gingrich's double jeopardy rights.

At sentencing, the court counted a federal conviction in Mr. Gingrich's offender score. The State did not show that the federal conviction was comparable to a Washington felony. Accordingly, Mr. Gingrich's sentence must be vacated, and the case remanded for sentencing with a corrected offender score.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Bruce Gingrich rented a room in a house in rural Thurston County, and his girlfriend Shelly Hunt stayed with him. RP 145-149, 163. Several other people rented in the house, and it had a large driveway area and backed up on some woods. RP 140, 145, 151, 190, 191, 204. Hunt had befriended Jackie Taylor, who lived about a 9-minute drive away. RP 333.

Travis Brown, another resident in the house, called police when he heard Taylor outside banging on the glass door with a metal object. RP 183, 186, 187, 192. Police arrived, and Taylor made claims and showed a cell phone video that caused the police to arrest Mr. Gingrich for burglary. RP 136-139, 141. Hunt would later admit to Mr. Gingrich that she and Taylor had "cooked up" a story against Mr. Gingrich. RP 7-9.

Taylor's claims led to a search for a purse and its contents, but nothing was found in Mr. Gingrich's room, or anywhere else. RP 160-161, 164, 168, 171

Based on Taylor's claims, the State initially charged Mr. Gingrich with Residential Burglary. CP 1-2.

Right before trial was set to start, the prosecutor said that in watching the video, she noticed something in the person's hands she had not noticed before. She concluded they were metal knuckles. RP 9. The officer who obtained and shared the video had not noticed the items either, but readily agreed with the prosecutor. RP 143-144. When challenged later in trial, he opined that the items were knuckles but that he did not know that they were metal. RP 328. An alternative charge of burglary in the first degree was added. CP 1-2.

During voir dire, the prosecutor told prospective jurors that "your sole duty as the trier of fact is to determine if the allegations the State has made… whether those allegations are true, whether they occurred." RP 51.

Jackie Taylor didn't testify at the trial. The state had her arrested on a material witness warrant and then released her. RP

207-208. Then she successfully evaded arrest, even though the court continued the trial so that the State could submit her testimony. RP 210, 241, 250, 274, 280-281.

No one told the jury that any property had been taken without permission, what property may have been missing, or what the value of the property was. No one told the jury that the person in the video did not have permission to be inside the house.

The State did present the testimony of multiple police officers. Deputy Rodes said that Taylor provided him with a video that showed Mr. Gingrich taking her purse while she slept. RP 136-138, 143, 303, 307, 309-312. Others described how they found Mr. Gingrich in the woods. RP 200-203, 218-219.

After the State rested, the defense moved to dismiss. In justifying its case, the prosecutor argued that "[t]here has been no evidence that that individual ha[d] permission to enter that home." RP 355. The trial judge denied the motion, stating that she was not aware of any authority allowing a court to dismiss a case once the State rested. RP 356-357.

Mr. Gingrich presented two alibi witnesses. Amanda Fronczak drove Mr. Gingrich to Rainier that night and got into an accident on the way back. RP 372-383. They called their friend David Chambers who came and towed the car back to Mr. Gingrich's. RP 405-409.

Although the State did not present Taylor's testimony, defense counsel failed to propose a missing witness instruction.[1]

Earlier in the case, the prosecutor had discussed Taylor's absence. She told the court that Taylor was "extremely nervous about being here" because she'd "received a lot of push-back [from] Mr. Gingrich's friends [and] from the people she associates with, who also associate with Mr. Gingrich." RP 207-208. Taylor "was very clear" that there were no explicit threats, and that the push-back was not "coming explicitly from Mr. Gingrich." RP 208. Officers later confirmed (through Taylor's sister) that Taylor was actively avoiding contact. RP 281.

[1] In fact, defense counsel did not propose any instructions.

Addressing Taylor's absence during closing arguments, the prosecutor told the jury "[y]ou don't get to guess why Ms. Taylor is not present." RP 529. She went on to say "[y]ou don't get to consider that." RP 529.

The prosecutor also discussed the State's burden to prove its case beyond a reasonable doubt. She referred to a hypothetical juror who thinks "I really believe he did it, but I didn't feel like I had enough evidence, I wanted more evidence, but I do believe he did it." RP 469-470. According to the prosecutor, such a juror might be applying the wrong standard. RP 470.

She went on to say that she had met her burden if a juror thinks "I really believe he did that." RP 470. In her rebuttal closing, she accused defense counsel of misstating the reasonable doubt standard. RP 517. She rejected the argument that there would be reasonable doubt "if you have an abiding belief but you'd like more evidence." RP 517.

According to the prosecutor,

> [Defense counsel] is inaccurate, and it is an inaccurate statement of the law to tell you that even if you have an abiding belief but you'd like more evidence, you have to

> find him not guilty. That is an inaccurate statement of the law.
> RP 517.

She returned to this idea later in her closing: "So counsel's argument to that point is not accurate, and it's inconsistent with your jury instructions." RP 529.

The prosecutor also suggested that intent is established by knowing actions. She told jurors "[I]f you find that they're doing it knowingly, then they're acting with intent." RP 474.

In addition, the prosecutor told jurors that they'd "heard the testimony of all the individuals that Ms. Taylor went directly to Mr. Gingrich's home and directly confronted him." RP 477. In fact, no one had testified that Taylor went directly to Mr. Gingrich's home.

The prosecutor also said "I submit to you [Brown's] testimony is that he heard [Taylor] yelling about a purse." RP 518-519. Brown did not testify that Taylor was yelling about a purse.

The jury voted to convict Mr. Gingrich. CP 26-29. The court sentenced him to 60 months in prison. CP 34-45. In the Judgment and Sentence, the court noted that Mr. Gingrich had

been convicted of both first-degree burglary and residential burglary. CP 34. The court vacated the residential burglary conviction "because it merge[d] with" the first-degree burglary charge. CP 37.

The court also found that Mr. Gingrich's prior federal conviction for "Robbery, 1 while armed" was comparable to Washington state's offense. CP 30, 31, 36.

Mr. Gingrich timely appealed. CP 46.

ARGUMENT

I. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT.

The prosecutor improperly told prospective jurors that their "sole duty" was to determine if the allegations were true. She also told the jury that they should convict if they "believe [Mr. Gingrich] did it," even if they "wanted more evidence." She accused defense counsel of misstating the law. She argued that intent was established by proof of knowledge and told jurors they could not consider Taylor's failure to testify. The prosecutor also argued "facts" not in evidence. These repeated instances of misconduct prejudiced Mr. Gingrich and require

reversal of his conviction. The case must be remanded for a new trial.[2]

A. Prosecutorial misconduct can violate an accused person's due process right to a fair trial.

The right to a fair trial is "a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct can deprive the accused of a fair trial. *Id.*, at 703-704; U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §22.

A prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Prosecuting attorneys "must function within boundaries while zealously seeking justice." *Id.* In this case, the prosecutor departed from these fundamental rules.

A prosecutor does not fulfill the obligation to see justice done "by securing a conviction based on proceedings that

[2] Unless the court reverses for insufficient evidence, argued elsewhere in this brief.

violate a defendant's right to a fair trial—such convictions in fact undermine the integrity of our entire criminal justice system." *State v. Walker,* 182 Wn.2d 463, 476, 341 P.3d 976 (2015); *see also State v. Hawkins*, 14 Wn.App.2d 182, 188, 469 P.3d 1179 (2020).

Misconduct during argument can be particularly prejudicial. There is a risk that jurors will lend it special weight because of the prestige associated with the prosecutor's office. *Glasmann*, 175 Wn.2d at 706. The prejudicial effect is increased when misconduct occurs during the prosecutor's rebuttal closing. *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014). Such is the case here – the prosecutor committed misconduct in closing argument, including during rebuttal closing.

Reviewing courts examine the cumulative effect of improper conduct. *Glasmann*, 175 Wn.2d at 707-12. Prosecutorial misconduct may require reversal even where ample evidence supports the jury's verdict. *Id.*, at 711-12. The focus of the reviewing court's inquiry "must be on the

misconduct and its impact, not on the evidence that was properly admitted." *Id.*, at 711.

Absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Id.*, at 704. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the misconduct. *Id.*, at 707. In addition, courts focus on "whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In this case, multiple instances of misconduct require reversal of Mr. Gingrich's convictions.

B. The prosecutor misstated the role of the jury and undermined the State's burden to prove the elements of each crime beyond a reasonable doubt standard.

It is "an unassailable principle that the burden is on the State to prove every element [of a crime] and that the defendant is entitled to the benefit of any reasonable doubt." *State v. Warren*, 165 Wn.2d 17, 26–27, 195 P.3d 940 (2008). This standard "provides concrete substance for the presumption of

innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (internal quotation marks and citations omitted).

Misconduct during *voir dire*. The Supreme Court has said that "what occurs during voir dire is equally as important as what occurs during trial proceedings." *State v. Zamora*, 199 Wn.2d 698, 711, 512 P.3d 512 (2022) (discussing racial discrimination). Jury selection is "the potential juror's first introduction to the case, the courtroom, the proceedings, and their responsibility as a member of a jury." *Id.*, at 712. During this phase, the jury is "primed to view the prosecution through a particular prism." *Id.*

Here, the prosecutor committed misconduct during *voir dire.* She told jurors "your sole duty as the trier of fact is to determine if the allegations the State has made… whether those allegations are true, whether they occurred." RP 51.

This was misconduct. *State v. Evans*, 163 Wn. App. 635, 645, 260 P.3d 934 (2011). It "miscast the jurors' role as one of

determining what happened." *Id.* A juror's job is not to decide if they believe that something happened. *Id.* Instead, the jury's job is to determine if the State proved the elements of an offense beyond a reasonable doubt. *Id*.

Misconduct during closing arguments. The prosecutor built on her improper statements during closing arguments. She told jurors that she had met her burden if they could say "Man, I really believe he did that." RP 470. She combined this with argument that jurors could convict even if they wanted more evidence.[3] RP 469-470.

The prosecutor did not tie these arguments to the reasonable doubt standard. This was misconduct.

Mere belief is insufficient for conviction: "A juror's mere belief that an accused individual is guilty does not automatically mean that the State has met its burden." *State v. Magallanez*, 290 Kan. 906, 914, 235 P.3d 460 (2010); *see also Tanner v. State*, 26 Ala. App. 277, 278, 158 So. 196 (1934).

Instead, jurors are required to believe *beyond a reasonable doubt* that the State has met its burden of proof. A

[3] *See also* RP (6/2/22) 517.

jury "might, from the evidence, easily 'believe' (as the word is commonly understood) appellant guilty; and yet not 'believe it *beyond a reasonable doubt*.'" *Tanner*, 26 Ala. App. at 278 (emphasis in original).

The prosecutor's failure to tie her statements to the burden of proof and the reasonable doubt standard distinguishes this case from others addressing similar arguments about mere belief. *See State v. Clark*, 17 Wn.App.2d 794, 487 P.3d 549 (2021), *review denied*, 198 Wn.2d 1033, 501 P.3d 132 (2022); *State v. Larios-Lopez*, 156 Wn.App. 257, 233 P.3d 899 (2010); *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011). In these other cases, the prosecutors tied their arguments to the reasonable doubt standard and the burden of proof.

In *Clark*, the prosecutor told jurors "if you believe [the victim's] testimony *beyond a reasonable doubt* then you have enough evidence to convict." *Clark*, 17 Wn.App.2d at 804 (emphasis added).

In *Larios-Lopez*, the State's attorney argued that "if you believe this officer is telling the truth, *and you believe him to an abiding belief, I have proven to you beyond a reasonable doubt*

that the defendant is guilty." *Larios-Lopez*, 156 Wn.App. at 259 (emphasis added).

In *Thorgerson*, the prosecutor argued "if you believe her, you must find him guilty *unless there is a reason to doubt her based on the evidence in the case.*" *Thorgerson*, 172 Wn.2d 454 (emphasis added).

The arguments in Mr. Gingrich's case diverge from those addressed in *Clark, Larios-Lopez,* and *Thorgerson.* Here, the prosecutor made no effort to tie her arguments to the State's burden to prove the elements beyond a reasonable doubt.

Instead, the State's attorney told jurors that their sole duty was to determine if the allegations were true, and that *any* level of belief *required* conviction, whether or not jurors believed in Mr. Gingrich's guilt beyond a reasonable doubt. RP 51; RP 469-470, 517.

The problem could have been solved by inserting the reasonable doubt standard into the statement. For example, the prosecutor could have argued 'If you believe he did it *beyond a reasonable doubt,* the defendant is guilty.' Such an argument would be proper. *See Clark, Larios-Lopez, Thorgerson*. But the

prosecutor here did not tie the argument to the reasonable doubt standard. This misconduct requires reversal of Mr. Gingrich's convictions. *Evans*, 163 Wn. App. 635, 645.

The misconduct here was flagrant and ill-intentioned, because "[m]isstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." *Glasmann*, 175 Wn.2d at 713. Shifting the burden of proof in this way "is improper argument, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct." *Id.*

Mr. Gingrich's convictions must be reversed, and the charges remanded for a new trial. *Id.*

C. The prosecutor misstated the law and made arguments that conflicted with the court's instructions.

A prosecuting attorney commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Jones*, 13 Wn.App.2d 386, 403, 463 P.3d 738 (2020). A prosecutor's misstatement of the law "is a serious irregularity having the grave potential to mislead the jury." *State v. Walker*, 164 Wn.App. 724, 736, 265 P.3d 191,

198 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012) (*Walker* II).

A prosecutor's arguments "must be confined to the law stated in the trial court's instructions." *Id.; State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). Here, the prosecutor misstated the law and did not confine her argument to the law stated in the trial court's instructions.

Knowledge and intent. The prosecutor told jurors that proof of knowledge establishes intent: "[I]f you find that they're doing it knowingly, then they're acting with intent." RP 474. In fact, this inverts the relationship between knowledge and intent: "When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally." RCW 9A.08.010(2).

The court defined intent for the jury. CP 15. However, the court did not instruct jurors on the relationship between knowledge and intent. CP 4-25. Thus, not only did the prosecutor misstate the law; she also failed to confine her argument to the court's instructions.

Mr. Gingrich's intent was an issue for the jury. For both charges, the State was required to prove that he acted "with intent to commit a crime." CP 18, 22. The prosecutor's argument relieved the State of its burden to prove intent. The misconduct requires reversal. *See, e.g., State v. Jones*, 13 Wn. App. 2d 386, 408, 463 P.3d 738 (2020).

Taylor's failure to testify. In appropriate circumstances, jurors may draw an adverse inference from a witness's failure to appear.[4] *See, e.g., State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). When the court gives a "missing witness" instruction, a party may properly ask jurors to assume the absent witness would have provided unfavorable testimony. *Id.*

Here, the prosecutor made the opposite argument, unsupported by the law or by the court's instructions. She told jurors they *could not* consider Taylor's absence during deliberations. According to her,

> You don't get to guess why Ms. Taylor is not present… [Y]ou don't get to guess. You don't get to consider that. RP 529.

[4] Defense counsel deprived Mr. Gingrich of his right to the effective assistance of counsel by failing to request a missing witness instruction, as discussed elsewhere in this brief.

The argument is inconsistent with the court's instruction on reasonable doubt. As the court told the jury, "[a] reasonable doubt… may arise from the evidence *or lack of evidence*." CP 9 (emphasis added).

The argument is also contrary to the law. The prosecutor was free to suggest that the jury shouldn't consider Taylor's absence. She was not permitted to argue that they *couldn't* consider her absence.

The misconduct was particularly prejudicial because Taylor was the alleged victim of the charged crimes. Her absence was significant, and the prosecutor should not have told the jury that they were affirmatively barred from considering her failure to testify.

The prosecutor committed misconduct by misstating the law and by making arguments that conflicted with the court's instructions. Mr. Gingrich's convictions must be reversed, and the case remanded for a new trial. *Davenport*, 100 Wn.2d at 760.

D. The prosecutor improperly argued "facts" not in evidence.

A prosecuting attorney "may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Perez-Mejia*, 134 Wn.App. 907, 916, 143 P.3d 838 (2006) (citing *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)). A prosecutor's "[r]eferences to evidence outside of the record… constitute[s] misconduct." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Here, the prosecutor argued "facts" not in evidence. First, she falsely said "I submit to you [Brown's] testimony is that he heard [Taylor] yelling about a purse." RP 518-519. There are no facts in the record supporting this assertion. It was especially critical given Taylor's failure to testify and the allegation that Mr. Gingrich stole her purse.

Second, the prosecutor incorrectly told jurors that multiple witnesses said "that Ms. Taylor went directly to Mr. Gingrich's home and directly confronted him." RP 477. This was untrue. No one testified that Taylor went directly to Mr. Gingrich's house to confront him.

These "[r]eferences to evidence outside of the record" constituted misconduct. *Fisher*, 165 Wn.2d at 747. They were prejudicial, because they related directly to evidence that could have been supplied by Taylor, had she appeared and testified.

The misconduct prejudiced Mr. Gingrich. His convictions must be reversed, and the case remanded for a new trial.

E. The prosecutor improperly accused defense counsel of making "inaccurate" statements regarding the law.

In a jury trial, jurors must "accept the law from [the court's] instructions." CP 4. A prosecutor "may properly discuss specific instructions." CP 6. However, this does not mean that the prosecutor can attack a defense attorney's integrity by arguing that counsel made "inaccurate" statements about the law. RP 517, 529.

Here, the prosecutor told jurors "Mr. Hack is inaccurate" and that he provided "an inaccurate statement of the law." RP 517. She went on to say "counsel's argument… is not accurate, and it's inconsistent with your jury instructions." RP 529.

If defense counsel makes inaccurate statements of the law, the prosecutor's remedy is to object and ask the court to caution the jury. The prosecutor here did not take this road, but accused counsel of making "inaccurate" statements. At best, this implied that counsel was ignorant of the law. At worst, it suggested "deception and dishonesty." *Lindsay*, 180 Wn.2d at 431–32.

The misconduct was especially egregious because it involved the burden of proof and the reasonable doubt standard. As noted, the prosecutor misrepresented these core principles to the jury. Maligning defense counsel magnified the error. It "severely damage[d]" Mr. Gingrich's opportunity to present his case. *Id.* at 432.

The convictions must be reversed. The case must be remanded for a new trial.

F. The combined effect of the prosecutor's misconduct prejudiced Mr. Gingrich.

A conviction must be reversed "where several errors combined to deny the defendant a fair trial." *Evans*, 163 Wn. App. at 647. Here, the prosecutor misstated the jury's role,

undermined the presumption of innocence and the State's burden to prove the elements beyond a reasonable doubt, argued "facts" not in evidence, and maligned defense counsel by accusing him of incompetence or dishonesty.

Whether considered separately or cumulatively, this misconduct was flagrant and ill-intentioned. It violated professional standards and case law that was available to the prosecutor. *Glasmann*, 175 Wn.2d at 707.

The misconduct included statements misstating the role of the jury and undermining the "bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *Winship*, 397 U.S. at 363 (internal quotation marks and citations omitted). The prosecutor introduced "facts" touching on critical issues in the case. She misstated the law and made arguments that conflicted with the court's instructions, disparaging defense counsel in the process.

The prejudice stemming from these repeated instances of misconduct could not have been cured by an instruction. The

misconduct was flagrant and ill-intentioned. It requires reversal of Mr. Gingrich's convictions and remand for a new trial.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE BURGLARY AND TO PROVE THAT MR. GINGRICH WAS ARMED WITH A DEADLY WEAPON.

Although the State alleged that Mr. Gingrich unlawfully entered Taylor's house and took her property, Taylor did not testify. In the absence of her testimony, the prosecution did not prove beyond a reasonable doubt that the entry was unlawful or that Mr. Gingrich had the intent to commit a crime. Furthermore, the State did not prove that Mr. Gingrich was armed with a deadly weapon.

Due process requires the State to prove beyond a reasonable doubt all facts necessary for conviction.[5] U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). A conviction based on insufficient evidence must be reversed and the charge dismissed with

[5] The same is true regarding a sentencing enhancement. *See State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995).

prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). Here, the State did not prove the essential elements of burglary.

Evidence is insufficient for conviction unless a rational jury could find guilt beyond a reasonable doubt. *State v. D.R.C.*, 13 Wn.App.2d 818, 824, 467 P.3d 994 (2020). Although a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences that can be drawn from it,[6] the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006).

To prove burglary, the State was required to establish that Mr. Gingrich unlawfully entered a building or residence with the intent to commit a crime against a person or property therein. RCW 9A.52.020; RCW 9A.52.025; CP 18, 22. The first-degree burglary charge also required proof that Mr. Gingrich was armed with a deadly weapon. The evidence was insufficient to prove these elements.

[6] *See State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

Unlawful entry. Instead of presenting Taylor's testimony, the State relied solely on her demeanor and a video of the alleged offense. RP 478. This evidence was insufficient to prove an unlawful entry.

No one testified that Mr. Gingrich was not "licensed, invited, or otherwise privileged to enter" the residence. CP 16. Taylor knew Gingrich and may have authorized him to come in the house at will. Alternatively, he may have been invited by a housemate. It is also possible that had access rights because he was a part-owner, or because his name was on a lease.

Without any testimony on the subject, the State failed to prove unlawful entry. The evidence was insufficient for conviction.

Intent to commit a crime. According to the State, Mr. Gingrich intended to steal Taylor's purse from the residence. Although the video shows a figure taking a purse from inside the house, no one testified to ownership of the purse. It could have belonged to Mr. Gingrich, his girlfriend, or another friend of his. If Mr. Gingrich lawfully entered to retrieve property,

taking the purse did not prove that he entered with intent to commit a crime.

Although Taylor was upset when she spoke to police, no evidence was introduced showing why she was upset. For example, her demeanor and the video were consistent with a theft by someone who *lawfully* entered the residence.

Deadly weapon - burglary. To convict Mr. Gingrich of first-degree burglary, the State was obligated to prove that Mr. Gingrich was "armed with a deadly weapon" during the offense. CP 13, 18. RCW 9A.52.020. A deadly weapon is one "which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 17; RCW 9A.04.110(6).

The State did not prove this element. The video shows a person wearing artificial knuckles. It does not show use, attempted use, or a threat to use them. Nor did any such use, attempt, or threat create circumstances where the knuckles were readily capable of causing death or substantial bodily harm.

Even if the video shows a person who was armed, it did not show that they were armed with a deadly weapon. The evidence was insufficient for conviction of first-degree burglary.

Deadly weapon – enhancement. For purposes of the enhancement, the court told jurors that "[m]etal knuckles are a deadly weapon." CP 23; *see* RCW 9.94A.825. Here, the video does not show what the knuckles were made of. The police did not recover them, and Deputy Rodes admitted that he did not know if the knuckles in the video were made of metal. RP 329.

Had the State proved beyond a reasonable doubt that they were metal knuckles, it would have met its burden on the deadly weapon enhancement. However, the State was unable to make this showing. There was testimony about the availability of wooden knuckles, leather knuckles, carbon fiber knuckles, porcelain knuckles, and plastic knuckles. RP 326-329.

If the implement was not made of metal, it did not qualify as a deadly weapon *per se.* Instead, the State was required to show that the knuckles were a deadly weapon in fact. This required proof that they "ha[d] the capacity to inflict

death." CP 23; RCW 9.94A.825. The State was also required to prove that they were used in a manner "likely to produce… death." CP 23; RCW 9.94A.825.

Nothing in the record shows that they had the capacity to inflict death, or that they were used in a manner likely to produce death. Accordingly, the evidence was insufficient to prove that Mr. Gingrich was armed with a deadly weapon for purposes of the enhancement.

Remedy. The evidence was insufficient to prove burglary. Both charges must be dismissed with prejudice. *Smalis*, 476 U.S. at 144.

Furthermore, even if the evidence were sufficient to prove unlawful entry and intent to commit a crime, the State didn't prove that Mr. Gingrich committed first-degree burglary. His conviction for that offense must be reversed and the charge dismissed with prejudice. *Id.*

The State also failed to prove beyond a reasonable doubt the deadly weapon enhancement. If the charges are not dismissed, the enhancement must be vacated.

III. THE COURT'S INSTRUCTIONS VIOLATED MR. GINGRICH'S RIGHT TO DUE PROCESS.

In its "to convict" instructions, the court used two different standards telling jurors how to approach the evidence. For conviction, the standard for reviewing the evidence was less onerous than the standard for acquittal. This violated Mr. Gingrich's right to due process.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A jury instruction "that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction offends due process." *Victor v. Nebraska*, 511 U.S. 1, 29, 114 S. Ct. 1239, 1254, 127 L. Ed. 2d 583 (1994) (Blackmun, J., concurring).

In reviewing a challenge to instructions, "courts must read [the instructions] as would an ordinary, reasonable juror." *State v. Killingsworth*, 166 Wn. App. 283, 285, 269 P.3d 1064 (2012). Whether an accused person "has been accorded full

constitutional rights depends on the way a reasonable juror *could have* interpreted the instruction." *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (emphasis added); *see also State v. Walden*, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997).

The court correctly instructed jurors that they had a "duty to return a verdict of not guilty" if they had a reasonable doubt. CP 18, 22; *see State v. Smith*, 174 Wn. App. 359, 369, 298 P.3d 785 (2013); *State v. Brown*, 130 Wn. App. 767, 770, 124 P.3d 663 (2005). Similarly, the court properly told jurors that they had a duty to convict if the elements had been proved beyond a reasonable doubt. CP 18, 22.

However, the court differentiated between conviction and acquittal in how jurors were to examine the evidence. To convict, jurors were to reach a verdict "from the evidence." CP 18, 22. By contrast, a decision to acquit could only come after "weighing all of the evidence." CP 18, 22.

This suggested that a guilty verdict could come from a less stringent review of the evidence. The court did not instruct

jurors that they were to "weigh[] all the evidence" before convicting Mr. Gingrich. CP 18, 22. Instead, they could convict based on a finding "from the evidence." CP 18, 22.

Due process requires a jury to review and weigh all the evidence before reaching a guilty verdict. By suggesting otherwise, the court violated Mr. Gingrich's right to due process.

By contrast, a jury need not weigh all the evidence to acquit. If a partial review of the evidence shows that the State has not met its burden as to one or more elements, the jury must acquit and has no duty to weigh the remainder of the evidence.

Here, a reasonable juror could believe the court's use of different language meant different things. Comparing the phrase "from the evidence" with "after weighing all the evidence," a reasonable juror might believe that conviction was permissible on a less stringent review of the evidence, and that if the jury were to acquit, they could not do so without a more thorough review.

This is incorrect. An instruction should not require jurors to acquit only upon a deeper look at the evidence than that

required for conviction. The instruction suggested an "improperly high" level of examination of the evidence to acquit, and an "improperly low" level to convict. *Victor,* 511 U.S. at 29 (Blackmun, J., concurring) (addressing doubt and certainty).

The court's "to convict" instructions violated Mr. Gingrich's right to due process. His convictions must be reversed, and the case remanded for a new trial.

IV. MR. GINGRICH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Taylor, the State's most crucial witness, did not appear for trial. Despite this, defense counsel did not propose a "missing witness" instruction. In addition, counsel failed to object to repeated instances of prosecutorial misconduct. Mr. Gingrich's convictions must be reversed because he was denied the effective assistance of counsel.

An accused person is guaranteed the effective assistance of counsel. U.S. Const. Amend. VI and XIV; Wash. Const. art. I, §22; *State v. Classen,* 4 Wn.App.2d 520, 422 P.3d 489 (2018). A person claiming ineffective assistance must show

deficient performance resulting in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *State v. Drath*, 7 Wn.App.2d 255, 266, 431 P.3d 1098 (2018).

To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Prejudice is established when "there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (internal quotation marks and citations omitted). This standard is less than a preponderance; it requires only a probability sufficient to undermine confidence in the outcome. *Id.*

A. Defense counsel failed to object to prosecutorial misconduct.

Mr. Gingrich's attorney did not object when the prosecutor committed misconduct. The prosecutor misstated the role of the jury, undermined the presumption of innocence and the State's burden to prove its case beyond a reasonable doubt, misstated the law, contradicted the court's instructions, disparaged defense counsel, and argued "facts" not in evidence.

Each instance of misconduct should have drawn an objection. Failure to object to prosecutorial misconduct is objectively unreasonable under most circumstances: "At a minimum, an attorney… should request a bench conference… where he or she can lodge an appropriate objection." *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005).

Here, counsel did not take this minimum step. He should have objected to the prosecutor's improper statements, asked the court to strike the remarks, and requested a mistrial. The prosecutor's misconduct denied Mr. Gingrich a fair trial.

By failing to protect his client from the prejudicial impact of multiple instances of misconduct, Mr. Gingrich's attorney

deprived him of the effective assistance of counsel. Counsel's failure to object created a probability sufficient to undermine confidence in the outcome. *Lopez*, 190 Wn.2d at 116. Mr. Gingrich's convictions must be reversed. *Id.*

B. Defense counsel unreasonably failed to propose a missing witness instruction.

Taylor was the State's most important witness. As the victim of the alleged burglary, she was the only one who could testify to the lawfulness of Mr. Gingrich's entry. She was also the only witness who could testify whether taking items from the house amounted to a crime. The jury should have been permitted to draw an adverse inference from her failure to testify. Despite this, counsel did not request a "missing witness" instruction.[7]

When addressing an ineffective assistance claim based on the failure to request an instruction, courts consider three questions. The court "must find that [the defendant] was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction, and that the failure

[7] In fact, counsel did not propose any instructions.

to request the instruction prejudiced [the defendant]. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

An accused person "is entitled to a correct statement of the law and should not have to convince the jury what the law is." *State v. Thomas*, 109 Wn.2d 222, 228, 743 P.2d 816 (1987). Even though counsel had a valid missing witness argument, he did not request an instruction or even argue the missing witness rule. He was silent about Taylor's absence. Counsel's failure to address the issue was exacerbated by the prosecutor's argument that jurors couldn't consider Taylor's absence. RP 529.

Mr. Gingrich was entitled to the instruction. The missing witness rule "is uniformly applied by the courts and is an integral part of our jurisprudence." *Pier 67, Inc. v. King Cnty.*, 89 Wn.2d 379, 385–86, 573 P.2d 2 (1977) (internal quotation marks and citations omitted). There are three prerequisites for application of the rule against the prosecution.[8]

[8] A fourth requirement prohibits the State from making use of the rule in a criminal case when doing so "would infringe on a criminal defendant's right to silence or shift the burden of proof." *Montgomery*, 163 Wn.2d at 598–99.

State v. Montgomery, 163 Wn.2d 577, 598–99, 183 P.3d 267 (2008).

First, the potential testimony of the uncalled witness must be material and not cumulative. *Id.* Here, Taylor was not merely material, she was critical to the State's case. She was the alleged victim of the burglary.

No one testified regarding the lawfulness of Mr. Gingrich's (alleged) entry into the house. He may have been granted entry by another resident, or he might have had a standing invitation to come in whenever he wished. Presumably, Taylor could have refuted these possibilities.

Likewise, no one testified as to who owned the purse shown in the video. Taylor likely would have testified that it was hers, rather than belonging to Mr. Gingrich or (for example his girlfriend).

The prosecutor had no direct evidence of these elements. Instead, she was limited to arguing that Mr. Gingrich must not have had permission to enter and that he must have taken property that belonged to her. Had jurors been permitted to

draw an adverse inference from Taylor's absence, they might well have questioned the prosecutor's assertions.

Second, the doctrine does not apply if the missing witness's absence is satisfactorily explained. *Id.* Here, the State failed to provide a satisfactory explanation for Taylor's absence.

According to the prosecutor, Taylor was nervous because she'd "received a lot of push-back [from] Mr. Gingrich's friends," who made it clear "that they did not approve." RP 207-208. She "was very clear" that there were no explicit threats. RP 208. The prosecutor referenced "what *I* would describe as implicit threats," but did not say that Taylor saw them that way. RP 208 (emphasis added). Nor did the prosecutor provide information about these so-called "implicit threats." RP 208.

This "push-back," the disapproval from her community, and what the prosecutor viewed as "implicit threats," do not provide a satisfactory explanation for her absence. A person who fabricated or exaggerated a crime would have a strong incentive to avoid court—to escape the negative judgments of

her associates. As the Supreme Court has remarked, there is "a reluctance, common to many citizens, to get involved in court proceedings." *State v. Bourgeois*, 133 Wn.2d 389, 404, 945 P.2d 1120 (1997). This reluctance "could, however, be due to many reasons other than physical fear." *Id.*, at 404-405.

Third, the rule "does not apply if the uncalled witness is equally available to the parties." *Blair*, 117 Wn.2d at 490. But the question of availability "does not mean that the witness is in court or is subject to the subpoena power." *Id.*

Instead, availability is determined based on the witness's "relationship to the parties, not merely physical presence or accessibility." *State v. Cheatam*, 150 Wn.2d 626, 653, 81 P.3d 830 (2003) (internal quotation marks and citations omitted).

The standard requires either "'a community of interest between the party and the witness… [or] so superior an opportunity for knowledge of [the] witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.'" *Id.*, (quoting *Blair*, 117 Wn.2d at 490) (some internal quotation

marks and citation omitted). Availability does not turn on whether "the other party could call the witness." *Id.*

In this case, the State shared a strong "community of interest" with Taylor. *Id.* She was the alleged victim and the only person with direct knowledge regarding two essential elements required for conviction—unlawful entry and the intent to commit a crime. CP 18, 22.

The State's interests were tightly bound to Taylor's account of events. It is irrelevant that Mr. Gingrich could have sought Saunders' attendance at trial. *Id.* The missing witness rule does not rest on whether he could have summoned Taylor to testify. *Id.*

Under these circumstances, it is "reasonably probable that [Taylor] would have been called to testify" for the State, and the State's failure to present her testimony suggests "that [her] testimony would have been damaging." *Id.* (internal quotation marks and citation omitted).

The missing witness rule applied, and Mr. Gingrich would have been entitled to an instruction telling jurors that they could draw an adverse inference from Taylor's absence.

Counsel's performance was deficient. Taylor was a crucial State witness. She did not testify. Her absence was significant because it left the State without direct testimony regarding two essential elements of each crime. Under these circumstances, counsel should have proposed a missing witness instruction, allowing jurors to draw an adverse inference from her absence.

Counsel's failure cannot be dismissed as a strategic decision. Not all strategies are immune from attack. *State v. Crow*, 8 Wn. App. 2d 480, 509, 438 P.3d 541 (2019). The relevant question "is not whether counsel's choices were strategic, but whether they were reasonable." *Id.*

Here, "no reasonable trial strategy explains defense counsel's failure." *Id.*, at 509-510. A missing witness instruction would have supported the defense. Counsel repeatedly told the court that "[t]his whole case is based on assumption." RP 506-515. A missing witness instruction would have strengthened this argument.

Counsel need not have worried about opening the door to evidence about any "implicit threats" to Taylor. RP 208. First,

such evidence would have been inadmissible, especially because Taylor was clear that the threats didn't come from Mr. Gingrich. *See State v. Vazquez*, 198 Wn.2d 239, 258, 494 P.3d 424 (2021), *as amended* (Oct. 20, 2021). Second, without Taylor, the prosecutor could not establish that she had received "implicit threats;" thus, the State could not show that her absence was due to such threats. RP 208.

No legitimate strategy explains counsel's failure to request a missing witness instruction. Counsel's performance was deficient.

Mr. Gingrich was prejudiced. Counsel's error led to "a probability sufficient to undermine confidence in the outcome." *Crow*, 8 Wn. App. 2d at 509. Given the officer's interpretation of the video, this case posed a challenge for the defense. Anything that would have strengthened the defense position would likely have made a difference.

This is especially true regarding Taylor's absence. Defense counsel's theme in closing was that the State's case was built on assumptions. RP 506-515. The State's need to rely on assumptions stemmed from Taylor's absence. Highlighting

her absence and asking jurors to draw an adverse inference would have strengthened counsel's argument.

The problem was exacerbated by the prosecutor's misconduct relating to the missing witness rule. The prosecutor improperly told jurors that they *couldn't* consider Taylor's absence. Defense counsel should have objected to this argument. Furthermore, a missing witness instruction would have made clear that the prosecutor's argument was improper.

Defense counsel's failure to propose a missing witness instruction amounted to deficient performance. Mr. Gingrich was prejudiced by counsel's error. He was deprived of his Sixth Amendment right to the effective assistance of counsel, and his convictions must be reversed.

V. THE TRIAL COURT INFRINGED MR. GINGRICH'S DOUBLE JEOPARDY RIGHTS.

The Judgment and Sentence shows that Mr. Gingrich was convicted of both first-degree and residential burglary. CP 34. This violated Mr. Gingrich's double jeopardy rights, even though the court vacated the residential burglary "because it merge[d] with" the first-degree burglary charge. CP 37.

The constitution protects an accused person "from being twice put in jeopardy for the same offense." *Turner*, 169 Wn.2d at 454; U.S. Const. Amend. V; U.S. Const. Amend. XIV; Wash. Const. art. I, §9. This prohibits courts from "imposing multiple punishments for the same criminal conduct." *Id.*

The term 'punishment' encompasses more than just an offender's sentence. *Id.* This is so because adverse consequences attach to a conviction, even if no sentence is imposed. *Id.*, at 454-455. At a minimum, "a conviction carries a societal stigma." *Id.*, at 464.

The remedy for a double jeopardy violation is to vacate one of the underlying convictions. *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007). However, a court violates double jeopardy by vacating a conviction "while directing, in some form or another, that the conviction nonetheless remains valid." *Turner*, 169 Wn.2d at 464.

In this case, the sentencing court violated *Turner*. By noting that Mr. Gingrich had been convicted of the offense, the court exposed Mr. Gingrich to consequences that include "societal stigma." *Id.*

Mr. Gingrich's case must be remanded with instructions to strike all references to Count II, the residential burglary charge. *Id.*

VI. THE TRIAL COURT ERRED BY SENTENCING MR. GINGRICH WITH AN OFFENDER SCORE OF THREE.

An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013). Offender score calculations, including questions of comparability, are reviewed *de novo*. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014); *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014).

For sentencing purposes, prior federal convictions are classified according to their Washington equivalents, if any. RCW 9.94A.525 (3). A federal conviction may not be used to increase an offender score unless it is comparable to a Washington felony. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The State bears the burden of showing by a preponderance of the evidence that a prior conviction adds to the offender's score. *Ford*, 137 Wn.2d at 480.

Questions about comparability "present issues of law that [courts] review de novo." *Jordan*, 180 Wn.2d at 460. To determine whether a federal conviction is legally comparable to a Washington offense, the court must compare the elements of the federal conviction to the elements of potentially comparable Washington statutes. *In re Pers. Restraint Petition of Crawford*, 150 Wn. App. 787, 793–94, 209 P.3d 507 (2009). If the elements are "substantially similar," the offenses are legally comparable. *State v. Bluford*, 188 Wn.2d 298, 316, 393 P.3d 1219 (2017); *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). This permits the sentencing court to classify the offense in the manner "provided by Washington law." RCW 9.94A.525(3). The burden is on the State to prove comparability. *Olsen*, 180 Wn.2d at 472.

In this case, the State failed to prove comparability. Accordingly, Mr. Gingrich's federal conviction does not add to his offender score.

Mr. Gingrich stipulated that he had a prior federal conviction for "Robbery, 1 while armed [sic]." CP 30. Nothing

in the record shows that this prior conviction was comparable to a Washington offense.[9]

First, it is not clear from the record what offense Mr. Gingrich was convicted of. CP 30-31, 36. The reference to "Robbery, 1 while armed [sic]" does not include any citation to a federal statute. CP 30-31, 36.

Second, federal robbery is not comparable to robbery in Washington. Our state's definition of robbery requires proof of specific intent—the intent to steal. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256, 111 P.3d 837 (2005). By contrast, federal robbery is a general intent crime. *Id.,* at 255; *see also Carter v. United States*, 530 U.S. 255, 268, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000).

Although the *Lavery* court addressed comparability between a federal bank robbery[10] conviction and a robbery under Washington law, the same analysis applies to robberies committed in violation of the Hobbs Act. 18 U.S.C. §1951.

[9] Defense counsel remarked that the federal offense "would at least qualify." RP (6/21/22) 579. Regardless of what counsel meant by this, courts are not bound by stipulations to matters of law. *State v. Drum*, 168 Wn.2d 23, 33, 225 P.3d 237 (2010).

[10] 18 U.S.C.A. §2113.

As with the federal bank robbery statute, a Hobbs Act robbery is a general intent crime. 18 U.S.C. §1951; *see United States v. Garcia-Ortiz*, 904 F.3d 102, 108 (1st Cir. 2018). The government need not prove specific intent to steal in a Hobbs Act prosecution. *Id.*

Whether Mr. Gingrich's federal conviction was a bank robbery or a violation of the Hobbs Act, the State failed to prove that it was comparable to a Washington felony. His sentence must be vacated, and the case remanded for a new sentencing hearing. *Thiefault*, 160 Wn.2d at 420.

CONCLUSION

Mr. Gingrich's convictions must be reversed, because the State presented insufficient evidence of the charges.

In the alternative, the case remanded for a new trial. The prosecutor committed egregious misconduct. In addition, Mr. Gingrich was denied the effective assistance of counsel.

If the convictions are not reversed, the case must be remanded for a new sentencing hearing. Mr. Gingrich's federal robbery conviction is not comparable to a Washington felony and should not have been included in his offender score.

Furthermore, the trial court violated Mr. Gingrich's double jeopardy rights. In the judgment and sentence, the court made clear that his conviction for residential burglary was valid. All language relating to the residential burglary must be stricken from the judgment and sentence.

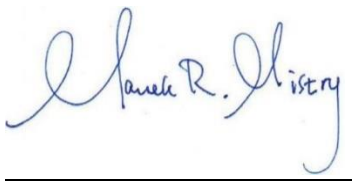
CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 9507 words, as calculated by our word processing software.

Respectfully submitted on November 14, 2022,

BACKLUND AND MISTRY

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Bruce Gingrich DOC# 282772
Monroe Corrections Center
P.O. Box 888
Monroe, WA 98272

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on November 14, 2022.

_____

Jodi R. Backlund, No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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